



SUPREME COURT, U. S.

70-27

Supreme Court, U.S.  
FILED

AUG 16 1971

IN THE

SUPREME COURT OF THE UNITED STATES

E. ROBERT SEE

OCTOBER TERM, 1971

No. 10-27 (876)

ROBERT MITCHUM, d/b/a THE BOOK MART,

Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting  
Attorney of Bay County, Florida, M. J.  
"DOC" DAFFIN, as Sheriff of Bay County,  
Florida, and THE HONORABLE W. L.  
FITZPATRICK, as Circuit Judge of the  
Fourteenth Judicial Circuit in and for  
Bay County, Florida,

Appellees.

On Appeal from the United States  
District Court for the Northern  
District of Florida  
Pensacola Division

---

APPELLEES' BRIEF

---

ROBERT L. SHEVIN  
Attorney General

RAYMOND L. MARKY      GEORGE R. GEORGIEFF

Assistant Attorneys General

Counsel for Appellees



## TOPICAL INDEX

	<u>Page</u>
OPINIONS BELOW	1
JURISDICTION	3
QUESTIONS PRESENTED	4
STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE AND FACTS	7
ARGUMENT	
POINT I	16
POINT II	46
CONCLUSION	49
CERTIFICATE OF SERVICE	50

TABLE OF CITATIONS

	<u>Page</u>
Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	13, 14, 15, 16, 17, 19, 20, 22, 33, 34, 40, 45
Baines v. City of Danville, 4th Cir. 1964, 337 F.2d 579	28, 34
Brooks v. Briley, M.D. Tenn. 1967, 274 F.Supp. 538, aff'd 391 U.S. 361	32, 48
Cameron v. Johnson, 390 U.S. 611 (1968)	19
Cameron v. Johnson, S.D. Miss. 1966, 262 F.Supp. 873 aff'd 390 U.S. 611 (1968)	32, 40
Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175, 182 (1968)	20
Carter v. Gautier, (M.D. Ga. 1969) 305 F.Supp. 1098	19
Cooper v. Hutchinson, 3rd Cir. 1950, 184 F.2d 119	30, 32
Dombrowski v. Pfister, 380 U.S. 479 (1965)	10, 11, 21, 44
Douglas v. City of Jeannette, 319 U.S. 157 (1943)	22

TABLE OF CITATIONS (Cont'd)

	<u>Page</u>
Egan v. City of Aurora, 7th Cir. 1960, 275 F.2d 377	33
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1965)	47, 48
Ex Parte Young, 209 U.S. 123 (1908)	21
Fenner v. Boykin, 271 U.S. 240, 243-44	21
Gideon v. Wainwright, 372 U.S. 335 (1963)	40
Greenwood v. Peacock, 384 U.S. 808 (1966)	34, 39, 40
Grove Press, Inc. v. City of Philadelphia, E.D.Pa. 1969, 300 F.Supp. 281	32
Hemsley v. Myers, Cir.Ct., D.Kan. 1891, 45 Fed. 283	24, 26, 34
Landry v. Daley, N.D.Ill. 1968, 288 F.Supp. 200	33
Machesky v. Bizzel, 5th Cir. 1969, 414 F.2d 283	22
Mitchum v. State, Fla.App. 1st 1970, 234 So.2d 420	8

TABLE OF CITATIONS (Cont'd)

	<u>Page</u>
Mitchum v. State, Fla.App. 1st 1970, 237 So.2d 72	11,19,34
Mitchum v. State ex rel.Schaub, Fla. 1971, ___ So.2d ___, Case No. 40,334, Opinion filed July 9, 1971, not yet reported	42
Near v. Minnesota, 283 U.S. 697 (1931)	19,42
Rage Books, Inc. v. Leary, S.D.N.Y. 1969, 301 F.Supp. 546	32.
Reetz v. Bozanich, 397 U.S. 82 (1970)	44
Sexton v. Barry, 6th Cir. 1956, 233 F.2d 220	32
Sheridan v. Garrison, 5th Cir. 1969, 415 F.2d 699	11,14,22, 23,33
Smith v. Village of Lansing, 7th Cir. 1957, 241 F.2d 856	32
South Florida Arts Theatres v. State ex rel. Mounts, Fla. App. 4th 1969, 224 So.2d 706	41

TABLE OF CITATIONS (Cont'd)

	<u>Page</u>
Stanley v. Georgia, 394 U.S. 557 (1969)	41
State of Florida, ex rel. Earl Faircloth v. M & W Theatres, Inc. appeal pending, Case No. 70-10, October Term 1971	14, 44
State v. Reese, Fla. 1969, 222 So.2d 732	41
Stefanelli v. Minard, 342 U.S. 117 (1951)	38
Tyrone, Inc. v. Wilkinson, E.D.Va. 1969, 294 F.Supp 1330	44
United States v. Reidel, ____ U.S. ___, 28 L.Ed 2d ____ (1971)	41
United States v. Thirty-Seven (37) Photographs, ____ U.S. ___, 28 L.Ed 2d 822 (1971)	41, 42
Vojcik v. Palmer, 7th Cir. 1963, 318 F:2d 171	32
Walker v. City of Birmingham, 388 U.S. 307 (1967)	43, 45
Younger v. Harris, 401 U.S. ___, 27 L.Ed 2d 669 (1971)	20, 21, 22, 44

OTHERS

	<u>Page</u>
Section 60.05, Fla. Stat.	7, 10
Section 823.05, Fla. Stat.	7
Section 847.011, Fla. Stat.	7
42 U.S.C. §1983	20, 23, 32
28 U.S.C. §2283	14, 15, 16, 20, 22, 24, 32, 33
Article V, Section 4(2), Florida Constitution	42

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 10-27 (876)

ROBERT MITCHUM, d/b/a THE BOOK MART,  
Appellant,

-vs-

CLINTON E. FOSTER, as Prosecuting  
Attorney of Bay County, Florida, M. J.  
"DOC" DAFFIN, as Sheriff of Bay County,  
Florida, and THE HONORABLE W. L.  
FITZPATRICK, as Circuit Judge of the  
Fourteenth Judicial Circuit in and for  
Bay County, Florida,

Appellees.

On Appeal from the United States  
District Court for the Northern  
District of Florida  
Pensacola Division

---

APPELLEES' BRIEF

---

OPINIONS BELOW

The memorandum opinion on July 22,  
1970 (App. 308-314), of the United States  
District Court for the Northern District

of Florida and the order dissolving the temporary restraining order is reported at 315 F. Supp. 1387 and the memorandum opinion on September 15, 1970 (App. 512-513); of that Court denying declaratory relief and granting dismissal is not as yet reported.

JURISDICTION

The judgment of the three-judge District Court of the Northern District of Florida dissolving the temporary restraining order, issued by His Honor, Judge Arnow, was entered on July 22, 1970 (App. 308-314). The judgment of the three-judge District Court denying declaratory relief and dismissing the action brought by Robert Mitchum was entered on September 15, 1970, (App. 512-513). A notice of appeal to this Court was filed in that Court on August 21, 1970, (App. 503).

The jurisdiction of this Court to review that decision is conferred by 28 U.S.C. 1253, there having been an order denying injunctive relief in a civil action required by Congress to be heard and determined by a District Court of three judges.

On May 3, 1971 this Court noted probable jurisdiction.

QUESTIONS PRESENTED

The question presented, as stated by the Appellant is wholly unacceptable to the Appellees as it is pregnant with assumptions of fact not considered by the District Court. Indeed, whether there was "bad faith" on the part of the Appellees, as opposed to an erroneous initial application of an otherwise valid law and/or whether there was irreparable injury both great and immediate would be the very matters to be determined by the District Court should this Court conclude said Court erred in denying injunctive relief. Accordingly, the Appellee will restate the questions presented on this appeal.

QUESTION ONE

WHETHER THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE THE ANTI-INJUNCTION STATUTE PRECLUDED A STAY OF THE PREVIOUSLY INSTITUTED AND PENDING STATE COURT PROCEEDINGS.

QUESTION TWO

WHETHER THE PLAINTIFF BY SUBMITTING HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED HIM OF THE RIGHT TO RESORT TO THE FEDERAL DISTRICT COURT FOR A RESOLUTION OF THOSE CLAIMS.

STATUTORY PROVISIONS INVOLVED

Statutes involved in this cause are set forth in full in Appellant's Brief and therefore will not be included herein.

### STATEMENT OF THE CASE AND FACTS

The statement of the facts contained in Appellant's Brief does not accurately or completely present the circumstances as they developed in this cause. Accordingly, Appellees submit herewith their version, as reflected by the record.

On March 30, 1970, the State of Florida, by and through Clinton E. Foster, the Prosecuting Attorney in and for Bay County, Florida, filed a complaint against Robert Mitchum, Dave Ballue and Clarence Howard Cantey under Sections 823.05 and 60.05, Florida Statutes, seeking to have the business known as "THE BOOK MART", located at 19 Harrison Avenue, Panama City, Florida, declared a nuisance. (App. 27-33) By said complaint a prayer for a temporary injunction pending final judgment, and upon final hearing a final judgment abating said nuisance was requested.

Notice of hearing was given to the adverse parties on March 31, 1970 (App. 37) and a subpoena duces tecum was issued directing the defendants to bring to said hearing one copy of each magazine located on the premises. (App. 34). At the hearing, held on April 3, 1970, counsel for the defendants in the state cause (Appellant herein) made a complete and total assault upon the constitutionality of the above mentioned Sections of the Florida Statutes, as well as Section 847.011. The defendant Ballue was excused by the trial judge from bringing the magazines as directed by

the subpoena (App. 50) but he brought magazines which he said were representative of the materials sold at "The Book Mart" (App. 50). On April 6, 1970, the trial judge entered an order reciting he had jurisdiction of the parties and that certain named magazines, which were described in detail, were found to be obscene. (App. 73) The court upon such findings and upon the evidence presented at the hearing, entered a temporary injunction prohibiting the operation of The Book Mart. The trial judge specifically stated final adjudication would be expedited in any reasonable manner upon the Appellant's request. (App. 74)

On the following day, Appellant instituted an appeal to the District Court of Appeal, First District, from the interlocutory order. (App. 266) On April 23, 1970, Appellant filed an eighty-five (85) page Brief in said appellate court which also assaulted the constitutionality of the several statutes mentioned, relying upon alleged rights guaranteed under the United States Constitution. (App. 386-487)

Appellant then filed in the state appellate court a "Motion to Review An Order Denying Motion for Supersedeas" of the temporary restraining order pending the interlocutory appeal. (App. 76-77) This motion was orally argued and denied by the court for the reasons stated in its written opinion, Mitchum v. State, Fla. App. 1st 1970, 234 So.2d 420, reproduced in the Appendix beginning at page 78. The court noted that the materials

described in paragraph 4 of the trial judge's order were submitted as being representative of the magazines being sold by Appellant, 234 So.2d at 421, and concluded the order denying supersedeas was therefore not shown to be arbitrary, as required by Florida Appellate Rules.

Without seeking any further appellate review in either the Florida Supreme Court or this Court, the Appellant, on April 30, 1971, instituted the suit involved herein in the United States District Court, Northern District of Florida, by the filing of a complaint for declaratory and injunctive relief. (App. 5-27) Appellant alleged the foregoing facts and claimed the various statutes were unconstitutional as written and/or applied. Although there were allegations contained in the complaint asserting the acts of the state officials were unlawful and violative of his First Amendment rights, no facts were alleged nor was the claim made that the Appellees were acting in bad faith or were harassing Appellant. Appellant's damages were alleged to be "untold monetary damages", "loss of profits" and "interference with [his] advantageous business relations." (App. 15-16)

On May 11, 1970, the cause was heard before District Judge Winston E. Arnow on Appellant's application for a temporary restraining order. At said hearing counsel for the Appellees objected to the motion on the grounds that the court lacked jurisdiction since the Appellant submitted his federal claims to the state

court precluding him from relitigating them in the federal district court. It was also argued that the complaint failed to state grounds for federal injunctive relief and that the anti-injunction statute barred such relief since there was a pending state court proceeding. Judge Arnow concluded that since the Appellant sold materials other than those held obscene and since Section 60.05, Florida Statutes, provides that an "injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance" preventing the operation of Appellant's presumptively lawful business presented "irreparable harm and injury." (App. 87) Judge Arnow concluded that under the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479 (1965), Appellant was entitled to a temporary restraining order. Appellees Foster and Daffin were restrained from enforcing the state court injunction, except to the extent such order prevented the sale of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice. (App. 87) Judge Fitzpatrick was not a party nor was he enjoined in any way whatsoever.

On May 29, 1970, Judge Fitzpatrick, on his own motion, entered an Order to Show Cause against the Appellant, Clarence Cantey, and Dave Ballue directing them to appear and show cause why they should not be held in contempt for violating his temporary injunction dated April 6, 1970. (App. 121) The hearing was set for June 5, 1970.

Shortly thereafter, Appellant filed in the state appellate court an "extraordinary motion" seeking an order from that court staying the interlocutory injunction so as to render it unnecessary for him to file an amended complaint in the federal district court seeking to add Judge Fitzpatrick as a party defendant and to obtain a restraining order against him. Appellant allegedly took this action in hopes of avoiding an unseemly confrontation between the United States District Court and the State Circuit Court. See: Mitchum v. State, Fla. App. 1st 1970, 237 So. 2d 72. The state appellate court, on June 17, 1970, declined to grant the motion for the sound legal reasons stated in its admittedly harshly written opinion.

In the meantime, the Appellant, on June 4, 1970, filed a motion in the federal district court for leave to file an amended complaint making Circuit Judge Fitzpatrick a party defendant. (App. 106) The amended complaint alleged that Judge Fitzpatrick's actions were "clearly in conflict with" Judge Arnow's restraining order of May 12, 1970 (App. 110, par. 7) and was an attempt to punish Appellant for "operating and maintaining a lawful business as permitted by the order entered by the Honorable Winston E. Arnow." (App. 110) District Judge Arnow, after hearing argument on the motion, citing Sheridan v. Garrison, 5th Cir. 1969, 415 F. 2d 699, and Dombrowski v. Pfister, *supra*, concluded there was presented irreparable damage requiring the granting of a temporary restraining order. (App. 132) No evidence was presented showing Appellant was served

with said order or was within the jurisdiction of the court, or that the threat of punishment as to him was great and immediate. District Judge Arnow thereupon restrained Judge Fitzpatrick from proceeding with a contempt hearing scheduled in the state court and also enjoined him from holding any other contempt hearing arising out of any alleged violation of his April 6, 1970 temporary injunction.

Since the Appellees were not enjoined from conducting further state proceedings to determine whether any given magazine was obscene and from enjoining the sale thereof, Appellee Foster filed an amended complaint in the state court alleging 214 specifically named periodicals were obscene and caused a second subpoena duces tecum to be issued directing the Appellant to produce them at a hearing scheduled for June 19, 1970. A hearing was held and the subpoena was complied with; however, several magazines not named were also produced, to-wit: "Cover Girl" and "Pinned." (App 292) At said hearing counsel for Appellant "...In order to save time..." tendered the magazines to Judge Fitzpatrick and agreed to "...stipulate that the entire evidence in the three boxes that we have here may go into evidence as representative of what is being sold at the store..." (App. 170) Judge Fitzpatrick asked counsel if he was admitting the publications and those of like nature were being offered for sale and counsel answered in the affirmative. (App. 171)

On June 25, 1970, Judge Fitzpatrick entered another order, reproduced on pages 190-193 of the Appendix. The order recites that he considered, among other publications, certain specifically named magazines and found all to be hard core pornography. (App. 192) He thereupon entered an order directing the sheriff to seize all publications offered for sale at The Book Mart and to retain them pending a final hearing. (App. 193) He enjoined Appellant from selling or offering for sale any publication named in said order or any other publication of the same character. (App. 193) The seizure was effected by the Appellee Daffin.

On June 22, 1970, after this Court rendered its decision in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), Appellees filed a Motion to Vacate the temporary restraining orders on the grounds that said decision rendered continuance of said restraining orders inappropriate. (App. 138-139) The motion was noticed for hearing on June 26, 1970. (App. 137)

Prior to the hearing, and based upon the actions taken by Judge Fitzpatrick, the Appellant filed a motion for leave to file an amended complaint for a temporary restraining order, preliminary injunction and permanent injunction. Included therein was a prayer that Judge Fitzpatrick and the other defendants be held in contempt for violating Judge Arnow's June 5, 1970 restraining order. (App. 145-149) Judge Fitzpatrick, of

course, in no way violated that order since he did not attempt to hold Appellant in contempt.

The various motions were argued before Judge Arnow and the Appellees contended that in light of Atlantic Coast Line Railroad continuance thereof was unwarranted inasmuch as the theory espoused in Sheridan, supra, and upon which Judge Arnow relied, was authoritatively repudiated. It was argued that while Judge Arnow's previous actions were supportable under Sheridan the Appellees' previously urged position that §2283 was an absolute bar to injunctive relief could not now seriously be questioned and that Sheridan could certainly not support continuance of the restraining orders. Judge Arnow declined to rule on any of the motions, except the motion for leave to file Appellant's amended complaint, pending hearing thereon by the full three-judge court (App. 281-82) scheduled for July 16, 1970.

Thereafter, the matter came on for hearing before the three-judge court, where it was again argued that injunctive relief was barred by §2283 and that the Appellant was precluded from raising his federal claims since he had raised them, without reservation, in the state courts and suffered an adverse ruling. Counsel for the Appellees advanced the identical argument presented to the same three judges on May 22, 1970, in the case of State of Florida, ex rel. Earl Faircloth v. M & W Theatres, Inc., appeal pending, Case No. 70-10, October Term 1971, butressed by the teachings of Atlantic Coast Line Railroad, supra.

On July 22, 1970, the three-judge court entered the order appealed denying Appellant's prayer for injunctive relief and dissolving the outstanding restraining orders entered by Judge Arnow. (App. 308-14) Their order rested upon this Court's decision rendered in Atlantic Coast Line Railroad and their conclusion that the Appellant's cause did not come within any of the three exceptions set forth in §2283. (App. 311)

QUESTION ONE

WHETHER THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BECAUSE THE ANTI-INJUNCTION STATUTE PRECLUDED A STAY OF THE PREVIOUSLY INSTITUTED AND PENDING STATE COURT PROCEEDINGS.

ARGUMENT

Section 2283 of Title 28 U.S.C. provides:

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effect its judgment." (Emphasis supplied)

This Court in Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970), clearly and unequivocally held §2283 was "...not a statute conveying a broad general policy for appropriate ad hoc application...[and that]...Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions..." This Court then held:

"Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld.

Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 398 U.S. at 287

In Atlantic Coast Line, just as in the instant case, a State court injunction had been previously entered and the District Court was asked to enjoin the parties from giving effect to or availing itself of the benefits of that state court order. In Atlantic Coast Line, the federal plaintiffs asserted their federally protected right to picket (their right to peaceably assemble and free speech) and this Court assumed the state trial judge was wrong in his interpretation of this Court's prior decision. See footnote 5

at page 291. Notwithstanding, this Court vacated the injunction issued by the District Court because it was not based upon one of the specific statutory exceptions to §2283. Moreover, this Court rejected the argument that the "principles of comity" rendered §2283 "...inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury..." See Brief of Respondents 26 L.Ed 2d at 866. This Court after properly noting our dual system could not function if state and federal courts were free to fight each other for control of a particular case, 398 U.S. at 286 perceptively noted:

"...Nor was an injunction necessary because the state court may have taken action which the federal court was certain was improper under the Jacksonville Terminal decision. Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court. Similarly if, because of the Florida Circuit Court's action, the union faced the threat of immediate irreparable injury sufficient to justify an injunction under usual equitable principles,

it was undoubtedly free to seek such relief from the Florida appellate courts, and might possibly in certain emergency circumstances seek such relief from this Court as well..." 398 U.S. at 296 (Emphasis supplied)

In the instant case, the Plaintiff, just as did the plaintiff in Atlantic Coast Line, asserted their allegedly federally protected rights and claimed the State trial judge erroneously interpreted prior decisions emanating from this Court, including Near v. Minnesota, 283 U.S. 697 (1931). The facts and circumstances of this case are no different from those presented in Atlantic Coast Line Railroad. In both, relief from allegedly unlawful state court judicial decrees were sought by resort to a United States District Court and in both federally protected rights were asserted.

Counsel's attempt to minimize the rights asserted or involved in Atlantic Coast Line (Brief at page 24) ignores reality. It was more than just a railroad case! The right to picket is clearly of equal dignity of those asserted by this appellant. Cameron v. Johnson, 390 U.S. 611 (1968) Indeed, a valid argument could be made that appellant's rights involved commercial or economic rights and thus were of less importance. Carter v. Gautier, (M.D. Ga. 1969) 305 F.Supp 1098; Mitchum v. State, Fla.App. 1st 1970, 237 So.2d 72. The fact that "...the subject of sex is of constant but rarely particu-

larly topical interest..." apparently justifies the conclusion that the rights involved in Atlantic Coast Line were far more important inasmuch as they involved political and social expression. Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175, 182 (1968).

Whether appellant's rights were of less importance or of equal dignity is actually immaterial for unless this Court concludes the Civil Rights Act, 42 U.S.C. §1983, provides an express exception to the anti-injunction statute it must affirm the order appealed, on the authority of, and for the precise reasons stated in Atlantic Coast Line Railroad. As the District Court observed, "...no amount of tortured reasoning by us will suffice to force the factual situation in this case... into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283..." (App. 312)

\* \* \* \* \*

Counsel attempts to extract from Younger v. Harris, 401 U.S. \_\_\_, 27 L.Ed 2d 669 (1971), and the companion cases decided by this Court on February 23, 1971, a judicial exception where bad faith harassment is shown. (Brief at page 25) No such construction is permissible for several reasons. First, this Court itself declined to consider whether 28 U.S.C. §2283 prohibited injunctive relief in and of itself because it was unnecessary for a disposition of the case. 27 L.Ed 2d at 681. Secondly, the "judicial exception"

referred to in Younger, supra, was stated to be "...where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages..." 27 L.Ed 2d at 675 (Emphasis supplied) This Court cited to Ex Parte Young, 209 U.S. 123 (1908) which of course held the courts of the United States have the power to enjoin state officers from instituting criminal actions. See also: Fenner v. Boykin, 271 U.S. 240, 243-44 (1926). The anti-injunction statute has been interpreted to mean that it does not preclude injunctions against the institution of state court proceedings, but only bars stays of suits already instituted. Dombrowski v. Pfister, 380 U.S. 479 (1965) footnote 2 at page 484. The Appellee does not question the authority of a Federal district court to enjoin a State officer from instituting a criminal prosecution. Of that there can be no question assuming exceptional circumstances exist.

It seems rather clear that this Court reversed Younger and the companion cases applying general equitable principles applicable where formal proceedings have not been instituted. Since they could not be justified even under general principles, it was unnecessary to decide the issue raised herein. The argument advanced that a person's right to have his federal claims determined in a federal court should not hinge upon a "race to the courthouse" simply ignores the fact that where injunctive relief is sought, by virtue of our dual system, the federal

courthouse door is generally closed tight. The reasons rest deeply imbedded in our history and our Constitution. Younger v. Harris, *supra*, 27 L.Ed 2d at 675-76 and Atlantic Coast Line Railroad, *supra*, 398 U.S. at 285-86. See also: Douglas v. City of Jeannette, 319 U.S. 157 (1943).

The Appellee suggests that no inference can be drawn from Younger that injunctive relief against pending state proceedings is authorized where bad faith harassment or irreparable injury is shown by virtue of this Court's express statement that that issue was not being considered or disposed of. Yet, that is exactly what Appellant is attempting to do!

\* \* \* \* \*

Before discussing the ultimate issue before this Court, the Appellee feels compelled to mention the case of Machesky v. Bizzel, 5th Cir. 1969, 414 F.2d 283, a case relied upon by Appellant. The Court in that case did not decide whether §1983 constitutes an express exception to the anti-injunction statute but rested the decision upon the conclusion that §2283 was not an absolute prohibition but was "...no more than a statutory enactment of the principle of comity..." 414 F. 2d at 287. See also: Sheridan v. Garrison, 5th Cir. 1969, 415 F.2d 699. As has been previously noted, this Court in Atlantic Coast Line Railroad, *supra*, completely rejected that contention and counsel's reliance upon Machesky is wholly unwar-

ranted. It was this very fact that caused Judge Arnow, who had previously relied upon Sheridan (App. 132) to concur with the other district judge in denying injunctive relief. (App. 314)

\* \* \* \* \*

The District Court, although it did not expressly so state, obviously concluded that 42 U.S.C. §1983 did not expressly authorize the issuance of injunctions against pending state court proceedings and thus within the exceptions specified in the anti-injunction statute. The Appellees submit that that is the proper conclusion; that this Court should so hold; and, that the District Court should be affirmed.

42 U.S.C., §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In Hemsley v. Myers, Circuit Court, D. Kan. 1891, 45 Fed. 283, a somewhat similar situation arose. An injunction was obtained against Hemsley declaring his place of business a nuisance restraining him from the further sales of intoxicating liquors. Hemsley filed an action in the federal court seeking injunctive relief against the sheriff, county attorney and state trial judge alleging he was being harassed and deprived of his right to carry on the business in which he was engaged and that the Kansas statute was in contravention of the Constitution of the United States. After hearing a temporary injunction was issued against further efforts to abate the use of the premises. A demurrer to the bill was filed. Said demurrer was sustained, the temporary injunction dissolved and the bill dismissed for want of equity.

In speaking of Section 720, the predecessor to 28 U.S.C. §2283, Judge Caldwell said:

This section, save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but in the cases

we are considering the jurisdiction of the state courts first attached, and that fact, independently of the statute, according to a well-settled rule, is a bar to the jurisdiction of this court. To the observance of the rule enunciated by this section and other cognate rules we are indebted for the almost uniform harmonious relations that have existed between the state and the United States courts, from the foundation of the government down to the present time. The rule would probably have been the same independently of the statute. The state courts observe the rule towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the state and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the state courts to the supreme court of the United States, and in this way suitors claiming a right or privilege under the constitution of the United States, or an act of con-

gress, or a treaty, may have the validity of their claim finally determined by the supreme court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory jurisdiction over the state courts.

The circuit courts of the United States and the state courts are each destitute of all power either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind; and there can be no higher evidence of the soundness of a rule of law than that there is a universal consensus of opinion that it is sensible and just.

It was specifically argued that the Civil Rights Act of 1871 repealed or abrogated, either wholly or partially, the anti-injunction statute. 45 Fed. at 289. In rejecting that argument Judge Caldwell stated:

"The provision in the section, as originally enacted, conferring jurisdiction on the district and the circuit courts of the causes of action enumerated in the section, has been transferred to the head of jurisdiction.

of those courts respectively. The section does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. If the section was stricken out of the statute, the rights, privileges, and immunities of the citizens under the constitution and laws would remain to them, and the mode of seeking redress for a deprivation of these rights would be the same that it is now. The section declares that the mode of proceeding to obtain redress for a deprivation of these rights shall be by 'an action at law, or a suit in equity, or other proper proceeding for redress.' If the case is one which under the well-understood rules of pleadings is cognizable only at law, then an action at law is the 'proper proceeding for redress;' and if it is one cognizable only in equity, then a suit in equity is the 'proper proceeding for redress.' No new mode of proceeding is enacted, and no new right created by this section. As it now stands in the Revised Statutes, it may be properly

denominated a 'declaratory' statute. And the statutes and rules of law defining and regulating the powers, relations, and jurisdiction of the state and the United States courts with reference to each other are not affected by this section in the slightest degree."

Interestingly, Judge Caldwell well appreciated the confusion and failure of justice that would result from a contrary holding and observed that an extraordinary spectacle would be presented of a United States court of chancery while it determined whether to grant the state leave to prosecute the alleged violation. 45 Fed. at 288.

In Baines v. City of Danville, 4th Cir. 1964, 337 F.2d 579, it was again argued that the Civil Rights Act was an exception to the anti-injunction statute. In an exhaustive opinion on the subject the Court rejected such contention saying:

"In strong contrast is the Civil Rights Act. It creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids. The substantive right, in many situations, may call for equitable relief, and equitable remedies are authorized, but only by a general jurisdictional grant. Creation of a general equity jurisdiction

is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. Effective removal of a cause of action from a state court to a federal court is incompatible with further proceedings in the state court, but there is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power or define the limits of his discretion.

"The anti-injunction statute can have effective application only with respect to those matters over which the district courts have a general equity jurisdiction. If there is no jurisdiction to grant an injunction of any kind, there is no room for the operation of a narrow statutory prohibition of injunctions having a specified effect. If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless.

"As we have seen, the few statutory exceptions to the anti-injunction statute, which the Supreme Court in 1941 recognized as having been carved out of the anti-injunction statute, rested upon statutes which were, at the least, thoroughly incompatible

with a literal application of the anti-injunction statute."

The Court, in response to the dicta contained in Cooper v. Hutchinson, 3rd Cir. 1950, 184 F.2d 119, to the contrary conclusion observed:

"Despite these considerations, or rather without overt recognition of them, it was held in Cooper v. Hutchinson, 3 Cir., 184 F.2d 119, that a Civil Rights Act provision for a suit in equity constituted an express authorization for an injunction against state court proceedings within the meaning of the qualification of §2283. The court did not indicate in any way why it thought a general provision for equity jurisdiction would constitute such an exception to the anti-injunction act. It simply stated its conclusion without elucidating the problem or its reasoning. Oddly enough, the court went on to deny injunctive relief on the general principles of equity and comity exemplified by Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed 1324, the same principles which underlie §2283.

"Later, a district court in the Third Circuit dutifully followed the lead of its Court of Appeals in Tribune Review Publishing

Company v. Thomas, W.D.Pa., 153 F.Supp. 486. Oddly, again, after holding, because of the Civil Rights Act, it had power to enjoin the state court proceeding, it found there was no basis for any relief and none was awarded.

"On the other hand, it was held in Smith v. Village of Lansing, 7 Cir., 241 F.2d 856, in Goss v. Illinois, 7 Cir., 312 F.2d 257, and in Sexton v. Barry, 6 Cir., 233 F.2d 220, that the Civil Rights Act's authorization of equitable relief was not an exception to the anti-injunction provisions of §2283. The conclusion was reached in those cases without reference to the Third Circuit case of Cooper v. Hutchinson and without consideration of the problem in depth.

"These conflicting decisions from our fellow courts in the lower echelon of the federal judicial system are of little help. Whether one follows the lead of the one or the other depends not upon the grace with which each expressed its ipse dixit, but upon underlying considerations which none of them explored. On one side or the other, there may have been a flash of genius, but their unelucidated conflict leaves us with no basis for reliance upon any of them.

"Our analysis, which we have outlined above, leads away from the Third Circuit's conclusion in Cooper v. Hutchinson. Statutory exceptions are not so easily found from a Congressional enactment of such vintage. Unless the later statute contains, or carries with it, strong evidence of an intention to repeal the earlier, or to carve out an exception from it, a court's duty is to harmonize the two. We possess no legislative power of repeal. When we deal with valid statutes, our only role is to construe them."

Other cases holding the Civil Rights Act not to be an express exception to §2283 are Smith v. Village of Lansing, 7 Cir. 1957, 241 F.2d 856; Vojcik v. Palmer, 7 Cir. 1963, 318 F.2d 171; Sexton v. Barry, 6 Cir. 1956, 233 F.2d 220; Brooks v. Briley, M.D. Tenn. 1967, 274 F.Supp. 538 aff'd 391 U.S. 361; Cameron v. Johnson, S.D. Miss. 1966, 262 F.Supp 873 aff'd 390 U.S. 611 (1968); and Rage Books, Inc. v. Leary, S.D.N.Y. 1969, 301 F.Supp. 546.

Grove Press, Inc. v. City of Philadelphia, E.D.Pa. 1969, 300 F.Supp. 281, a case relied upon by Appellant, without any discussion of the matter, simply cited to Cooper v. Hutchinson, supra. Moreover, Grove Press was not a party to the action in the state courts and hence §2283 was wholly inapplicable. Another case holding §1983 expressly authorizes injunctive re-

lief against pending state proceedings is Landry v. Daley, N.D. Ill. 1968, 288 F.Supp. 200. In that case, without citations of authority, the Court concluded "...an express exception has often times been found by implication..." 288 F.Supp. at 222. This reasoning is untenable for it is irreconcilable with this Court's admonition in Atlantic Coast Line Railroad, *supra*, that:

"[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover, since the statutory prohibition against such injunctions in part rests upon the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S. at 287 (Emphasis added)

Landry, like Sheridan predicated its holding on the premise that §2283 was to be interpreted with reference to the judicial doctrine of comity and not as an absolute bar, which, of course, is an improper construction of §2283.

None of the cases cited by Appellant on pages 23 and 24 of his Brief are applicable for not one involved an injunction against a state court proceeding. Indeed, Egan v. City of Aurora, 7 Cir.

1960, 275 F.2d 377; wasn't even an equitable action but was a civil action seeking damages under the Civil Rights Act.

The conclusion reached by the Fourth Circuit Court of Appeals in Baines v. City of Danville, supra, that the general grant of equity jurisdiction by the Civil Rights Act did not expressly authorize injunctive relief against pending state proceedings, is consistent with Atlantic Coast Line's rationale, and ought to be adopted by this Court. It is not only logical but it preserves the historic relationship between the State and Federal courts and is conducive to the orderly dispensation of justice. It avoids not only the friction which occurs when a federal court interferes with a state court, as exemplified by Mitchum v. State, supra, but it prevents the confusion and failure of justice that would obviously attend a contrary holding, as noted in Hemsley v. Myers, supra.

This Court in Greenwood v. Peacock, 384 U.S. 808 (1966), strictly construed the removal statutes, rejecting an appeal by the appellants not unlike that advanced herein, to-wit: that justice could not be had in the state courts. In so doing, this Court made the obvious and cogent observation:

"It is worth contemplating what the result would be if the strained interpretation of §1443(1) urged by the individual petitioners were to prevail. In the fiscal

year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone. But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of §1443(1), then every criminal case in every court of every State--on any charge from a five-dollar misdemeanor to first-degree murder--would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges

were filed, and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing could be followed either by a full trial in the federal court, or by a remand order. Every remand order would be appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought.

"We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared. And in the exercise of that power, we may assume that Congress is constitutionally fully

free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.

"But before establishing the regime the individual petitioners propose, Congress would no doubt fully consider many questions. The Court of Appeals for the Fourth Circuit has mentioned some of the practical questions that would be involved: 'If the removal jurisdiction is to be expanded and federal courts are to try offenses against state laws, cases not originally cognizable in the federal courts, what law is to govern, who is to prosecute, under what law is a convicted defendant to be sentenced and to whose institution is he to be committed. . . ?' Baines v. City of Danville, 357 F.2d 756, 768-769. To these questions there surely should be added the very practical inquiry as to how many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced.

"We need not attempt to catalog the issues of policy that Congress might feel called upon to consider before making such an

extreme change in the removal statute. But prominent among those issues, obviously, would be at least two fundamental questions: Has the historic practice of holding state criminal trials in state courts--with power of ultimate review of any federal questions in this Court--been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

"We postulate these grave questions of practice and policy only to point out that if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them."

See also: Stefanelli v. Minard, 342 U.S. 117 (1951) at 123-25, where this Court noted that insupportable disruption would result. Quoting Mr. Justice Holmes, this Court said:

"The relation of the United States and the Courts of the United States to the States

and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred-years and cannot be disposed of by a summary statement that justice requires me to cut red tape and to intervene." Memorandum of Mr. Justice Holmes in 5 The Sacco-Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516..." (Emphasis supplied) 342 U.S. at 125

The same vices referred to would result from a "loose construction" of the statutes involved herein. It would in effect make every United States District Court a tribunal obliged to conduct preliminary hearings of those charged with crimes under state laws. This Appellant, and those who auger for his position, are seeking to obtain through the Civil Rights Act that which they cannot have under the removal statutes. It seems strange to suggest that removal can justifiably be denied because of the Appellant's ability to vindicate his federal claims on direct review by this Court, 384 U.S. at 828, but that he can obtain federal relief in a district court under the Civil Rights Act. Such illogic would render the removal statute wholly unnecessary and the Civil Rights Act would then permit that which the civil rights removal statute does not, to-wit: "...the judges of the federal courts to put their brethren of the state judiciary on trial..." 384 U.S. 808, 828. That is precisely what occurred in this case with Judge Fitzpatrick.

A construction of said statutes as urged herein, on the other hand, would avert the evils mentioned. Additionally, it would provide a more workable guide for lower federal courts. Preliminary hearings, into the good faith of state authorities hundreds of miles from the locus of the controversy, which are themselves disruptive of the orderly administration of justice, would be unnecessary. The district court would merely have to look at the pleadings to determine whether to proceed further or deny relief summarily. The immediate effect would be the elimination of wasted judicial labor spent on determining whether the district court abused its discretion, applying general equitable principles. Cf. Gideon v. Wainwright, 372 U.S. 335 (1963). This would not mean the loss of a federal forum to consider the federal claims for there is a federal court properly constituted to sit as an overseer of the states, to-wit: this Court! Cameron v. Johnson, Atlantic Coast Line Railroad, and Greenwood v. Peacock, supra.

The Appellee respectfully submits that logic, common sense, order, statutory construction, history, and the Constitution itself commands this Court to conclude that the Civil Rights Act does not expressly authorize a court of the United States to enjoin or stay a pending state court proceeding.

\* \* \* \* \*

The Appellee feels compelled to respond to Appellant's charge that "...[h]

istorically speaking the Florida Courts have not been shown as inclined to accord First Amendment freedoms their proper safeguards..." (Appellant's Brief, p. 18)

Contrary to Appellant's interpretation of State v. Reese, Fla. 1969, 222 So.2d 732, which was not a civil censorship proceeding, but was on appeal by the State from an order declaring the statute unconstitutional, not unlike the case of United States v. Thirty-Seven (37) Photographs, \_\_\_\_ U.S. \_\_\_, 28 L.Ed 2d 822 (1971), the Florida Supreme Court specifically held §847.011 "...should be interpreted, and the words of our obscenity statute applied, in the light of the clarification or elaboration of the Roth test made in Memoirs, supra..." 222 So. 2d at 735. The Florida Supreme Court's narrow construction of Stanley v. Georgia, 394 U.S. 557 (1969), the correctness of which is not now before this Court, seems supportable in light of United States v. Reidel, \_\_\_\_ U.S. \_\_\_, 28 L.Ed 2d 813 (1971).

As to the soundness of South Florida Arts Theatres v. State ex rel. Mounts, Fla. App. 4th 1969, 224 So.2d 706, which likewise is not before this Court, the Appellee merely observes that said opinion speaks for itself. It may be determined in a future case that the decision is incorrect but the undersigned could, with some conviction, argue the merits before this very Court. The court in that case gave considerable attention to the prior decisions of this Court per-

taining to the issue. 224 So.2d at pages 709-12.

Appellant's claim that he was denied prompt judicial determination is not well founded. The state trial judge offered to expedite final hearing to accommodate counsel (App. 74 ) but Appellant elected to engage in a constitutional assault upon the statutes in both the state appellate courts and the federal courts. The delays caused by Appellant's flanking action cannot be considered the State's fault. United States v. Thirty-seven Photographs, supra, 28 L.Ed 2d at 833.

Rather than belabor the matter to a point of absurdity, the Appellee concludes by observing that when this Appellant finally presented the issues raised in the district court to the proper court under the Constitution of the State of Florida, Article V, Section 4(2), that Court granted him his relief as required by the Constitution of the United States as interpreted by this Court.

Mitchum v. State ex rel. Schaub, Fla. 1971, \_\_\_ So.2d \_\_\_, Case No. 40,334, Opinion filed July 9, 1971, not yet reported. A copy of the Opinion in this case is reproduced and appears in the Appendix to this Brief. In said decision the Court reversed the finding of obscenity because the trial judge failed to apply the Memoirs test and dissolved the injunction entered on the nuisance theory citing Near v. Minnesota, supra.

The Appellant's charge that the Florida

Supreme Court is insensitive to the constitutional rights of the litigants appearing before it is unwarranted and unfounded in fact. It has been challenged herein for it is, in fact, a charge that said tribunal is impervious to its constitutional duty to protect the constitutional rights, both state and federal, of those appearing before it. Such an accusation should only be made where it can be clearly and unequivocally demonstrated. In this, appellant has fallen woefully short. Undoubtedly, Appellant's verbal overkill is due to his "...impatient commitment to their cause..." Walker v. City of Birmingham, 388 U.S. 307 (1967), which was what also caused him to improperly feel he could violate the state court temporary restraining order. Walker v. City of Birmingham, supra.

\* \* \* \* \*

Appellee likewise feels compelled to respond to Appellant's newly founded claim of "bad faith harassment" as well as his contention that the totality of the circumstances demonstrate "great and immediate irreparable injury." (Appellant's Brief, p. 19)

First, the district court made no finding with respect to the motive of the Appellees, jointly and severally. Their decision was predicated on the conclusion that the anti-injunction statute was an absolute bar to injunctive relief and the court never reached the

issue of whether there was any bad faith, or irreparable injury, which could not be vindicated by normal proceedings.

Secondly, the complaint, and those following, never alleged bad faith and Judge Arnow never even intimated his restraining orders were based on such a finding. In fact, Judge Arnow was of the view that under Dombrowski and its progeny bad faith was not a requisite for in the case of State of Florida, ex rel Earl Faircloth v. M & W Theatres, Inc., appeal pending before this Court, Case No. 70-10, Oct. Term 1971, he granted injunctive relief in a case not unlike this one where it was stipulated that there was no bad faith. See Jurisdictional Statement in Case No. 70-10, at p. 6. Judge Arnow's actions in M & W Theatres, Inc. occurred on April 30, 1970, the same date the Appellant herein filed his complaint. Inasmuch as bad faith has now been raised for the first time---no doubt because of the Younger holding---the Appellees deny they or any one of them acted in "bad faith."

As to the Appellant's claim of irreparable injury, to-wit: that he was suffering a loss of profits and his business relations were being interfered with, which is what Judge Arnow based his restraining order on, as in M & W Theatres, Inc. also, that simply is not "irreparable injury." Reetz v. Bozanich, 397 U.S. 82 (1970); Tyrone, Inc. v. Wilkinson, E.D. Va. 1969, 294 F.Supp. 1330 at 1333.

As to the anticipated contempt hearing, which was brought about by Appellant's violation of the outstanding state court injunction which had never been vacated by any court, that could not constitute irreparable injury for he could vindicate his rights in his defense of that charge. Even if Judge Fitzpatrick's order was unlawful, Appellant was obliged to give obedience to it, the proper remedy for relief being by judicial review in the appropriate appellate court. Walker v. City of Birmingham, *supra*. The federal district court was simply not the proper forum to contest the validity of the state court injunction. Atlantic Coast Line Railroad, *supra*. The effect of the restraining order entered by Judge Arnspw was to render the state court judge impotent to effecuate and protect the lawful order he had previously entered. Such action was unwarranted and unprecedented.

As has been previously stated, these issues were not considered or passed upon by the three-judge district court and therefore are not relevant to the issue presented. They are discussed by the Appellee only because Appellant insists on injecting them into this cause and they cannot go unchallenged.

QUESTION TWO

WHETHER THE PLAINTIFF BY SUBMITTING HIS FEDERAL CLAIMS TO THE STATE COURT, WITHOUT RESERVATION, DEPRIVED HIM OF THE RIGHT TO RESORT TO THE FEDERAL DISTRICT COURT FOR A RESOLUTION OF THOSE CLAIMS.

ARGUMENT

At the hearing before the district court on July 16, 1970, counsel for the Appellees herein urged that said court lacked jurisdiction in the cause in light of the fact that the Appellant had already litigated the federal questions in the state courts of Florida and that, having suffered an adverse ruling, had appealed said ruling to the District Court of Appeal, First District, State of Florida. At that time, counsel for Appellant candidly admitted he did not reserve his federal claims. (App. 377) Of course, Appellant's abortive attempt to reserve his federal questions in the answer filed in the circuit court, a copy of which was mailed to the members of the Court on July 17, 1970, was too little, too late (App. 490).

What Appellant, in effect, sought to accomplish was to reserve his federal constitutional claims after having vol-

untarily submitted said claims to Florida's state courts, literally forcing them to rule upon the validity of those claims. He then sought to play off the state courts against the federal court hoping to secure a more favorable ruling in one than the other.

During the argument before the district court, Appellant's counsel suggested he had no option since Florida had elected the forum in which it was going to proceed against him. (App. 500) In truth and fact, a litigant has a choice whether to initially raise his federal claims in a state court or a federal court. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1965). So it is that if he chooses to reserve his federal claims for future action in federal courts, he should only give the state courts notice of his federal claims and not litigate them. Should he follow this procedure, he can, in effect, reserve his federal claims for presentation to a federal court. Id. In short, there is no way in which a litigant can be compelled to initially litigate his federal claims in state court.

In England supra, this Court unequivocally held the following:

"We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there and has them decided there, then...he has elected to forego his right to [litigate

them by a three judge panel]."

375 U.S. at 419

How Appellant could, in the face of that observation, thereafter seek to relitigate the issues already raised and acted upon by the state courts escapes Appellees.

The Appellee respectfully submits that the Appellant, without question, presented his federal constitutional claims and suffered an adverse ruling thereon, the correctness of which was then before the appellate court of Florida. Being dissatisfied with such ruling, he sought relief from the federal district court. England v. Louisiana Board of Medical Examiners, supra, clearly and unequivocally precludes such action. It matters not how he first arrived in the state courts or that the judgment is not "final" in the legal sense. What is crucial is that rather than reserving his claim, he tendered it and, having done so, obtained an adverse ruling appealable in nature. The Appellant's remedy was on direct appeal or by way of certiorari to this Court, not by a separate action seeking declaratory or injunctive relief. Brooks v. Briley, (D.C. Tenn. 1967), 274 F.Supp. 538), affirmed 391 U.S. 361. Accordingly, the district court properly denied injunctive relief.

CONCLUSION\*

The Appellees submit that the decision of the three-judge court was clearly correct and that they properly denied injunctive relief. The order appealed should be affirmed.

Respectfully submitted,

ROBERT L. SHEVIN  
Attorney General

RAYMOND L. MARKY  
Assistant Attorney General

GEORGE R. GEORGIEFF  
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellees' Brief has been forwarded, via U. S. Mail, to

Robert Eugene Smith, Esq.  
Suite 507  
The Alex. Brown & Sons Building  
102 West Pennsylvania Avenue  
Towson, Maryland 21204

Counsel for Appellant

and

Paul Shimek, Jr., Esq.  
517 North Baylen Street  
Pensacola, Florida 32501

Of Counsel for Appellant

this day of August, 1971

GEORGE R. GEORGIEFF  
Assistant Attorney General

A P P E N D I X

THE EIGHTH SECTION ADDRESSES TO THE REFERRED PARTITION AND, IN  
THE EIGHTH SECTION.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1971

1-7 1920-1930  
1920, 1921 1922 BOOKS  
AND MOVIES.

**Appellants.**

vs.

STATE OF FLORIDA ex rel., :  
FRANK SCHMIT, as State :  
Attorney of the 12th :  
Judicial Circuit of the :  
STATE OF Florida, :  
vs. :  
CITY OF TAMPA, :  
et al., :  
Defendants. :  
: *Plaintiff in Intervention*

CASE NO. 40-334

Appellee.

Opinion filed July 9, 1971.

An Appeal from the Circuit Court for Sarasota County, John H. Justice, Judge.

Robert S. McDaniel, Jr., and Robert Eugene Smith, for  
Appellants.

Frank Schauh and William C. Strode, for appellants.

CARLTON, J. J.

Appellants are owners and operators of a book store located in the City of Sarasota. They appeal from an Order entered by the Circuit Court, Sarasota County, through which appellants were permanently enjoined from selling obscene or pornographic materials, and permanently enjoined from further operation or maintenance of their business so as to annoy the community. Our jurisdiction vests by virtue of a ruling by the Circuit Court that Fla. Stat. 1847.011 is constitutional. Article V, 14(2), Florida Constitution. We affirm this holding, but find that the permanent

Prior to October 16, 1969, several persons in the City of Sarasota, either independently or at the request of the Police Department, visited the appellants' Adult Book and Movie Store, and found themselves offended by the nature of the materials sold. On October 16, 1969, State Attorney Schaub filed a complaint seeking a temporary and a permanent injunction against the appellants' possession and sale of obscene materials, and against their continuation of this type of business at the Adult Book and Movie Store premises on the ground that as operated the Store constituted a public nuisance.

This was followed on October 17 by a Motion for a Temporary Restraining Order filed under Fla. Stat. 867.011 on the theory that an apprehended violation would be committed if an immediate remedy was not afforded. This Motion was granted on October 23, 1969, on the basis of affidavits filed by police officers.<sup>1</sup> A hearing on the question of a permanent injunction was held on March 2, 1970. At that time, the State introduced into evidence certain publications known as Exhibits 1, 2 and 3 [not described in the record, or in the transcript of hearing, and not filed as part of the record on appeal], which were purchased prior to the filing of the complaint.

The State then proceeded to present ten witnesses who were to testify in relation to these Exhibits. After two persons had testified about purchases they had made and about their view of the materials sold at the Store, the litigants agreed that a stipulation could be entered as to what the remaining witnesses

<sup>1</sup>The Circuit Court Judge who issued this Order also presided over the hearing on the Permanent Injunction. At the conclusion of the March 2, 1970, hearing on the latter injunction, the Judge orally issued a ruling that the Temporary Restraining Order was invalid. Appellants have not raised any question about this Temporary Restraining Order on appeal, and, therefore, we do not treat it here. The materials brought in as exhibits in the Permanent Injunction hearing were purchased prior to the filing of the Complaint; and were not a part of any proceeding relating to the Temporary Restraining Order.

should say. The remainder of the proceedings was devoted to argument on the merits of the stipulated testimony, and to the form of the injunctions which were to be entered by the Court. On March 3, 1971, the permanent injunctions were entered: one prohibited appellants from selling that which was obscene; the other permanently enjoined the operation of the store as a nuisance.

Appellants now challenge the proceedings below on a number of points relating to the constitutionality of Fla. Stat. 847.011 generally, certain aspects of the proceedings, and the validity of the injunctions issued by the Circuit Court. We think the statute is secure as against a general attack on its constitutionality. St. Paul v. Karpis, 222 F.2d 732 (Fla. 1954); Wright v. State of Florida, Case No. 40,159, filed May 23, 1971. The ruling of the Circuit Court on this question is hereby affirmed.

But we defer from treating specific constitutional arguments because we find that as a matter of law the proceedings below were constitutionally defective. The March 3, 1969, hearing on the question of a permanent injunction was a prior adversary hearing held in advance of a judicial determination of obscenity. This type of proceeding is constitutionally sound, and presents an inherently acceptable forum for determination of obscenity. Missouri Dept., Inc. v. Lamm, 354 U.S. 436 (1957); United States v. Thorne-Swan (37) Photofinishers, 53 F.2d 4518, \_\_\_\_ U.S. \_\_\_\_ (1971).

In the instant case, however, the State urged the use of a constitutionally inadequate standard for the determination of obscenity. The State built its presentation around Fla. Stat. 847.011(10) as worded. Further it was the State's position that its witnesses:

[All] agreed that all of the publications they examined at the appellants' premises were of a similar nature and that the dominant theme of each taken as a whole by the average citizen of the Sarasota community, applying contemporary community standards, would appeal to prurient interests.

It is evident from a reading of the transcript that this was the obscenity concept accepted as determinative by the Court.<sup>2</sup> The appellants accepted a stipulation that the State's witnesses would not testify that the materials in the Store were obscene under the above standard, but appellants protested that this was an improper standard and they, of course, were right.

Flo. Stat. 3847.011(10) was an obscenity test taken from Roth v. United States (decided with Albert v. California), 354 U.S. 476 (1957). Subsequently, the Roth test underwent elaboration in ensuing obscenity cases decided by the United States Supreme Court.

In State v. Reiss, supra, Flo. Stat. 3847.011(10) came under attack as constitutionally defective since not reflective of the Roth test's revision.

We reviewed the opinions elaborating Roth's criteria for obscenity and concluded:

"We have the view, however, that the Supreme Court did not intend to abrogate the Roth test. It would seem, therefore, that a conviction based on the Roth test as 'elaborated' in Memoris v. Los Angeles, 303 U.S. 413 (1936) would -- or, at least, might -- have a good chance of standing up under a due process attack made on it in the United States Supreme Court; and Subsection (10) of 3847.011, supra, can and should be interpreted, and the words of our obscenity statute applied, in the light of the clarification or 'elaboration' of the Roth test made in Memoris, supra."

<sup>2</sup> At the conclusion of the hearing, the Circuit Court Judge said:

"My findings are going to be that the statute is constitutional as written; that this material which has been presented in the way of evidence and which has been described in the testimony of the witnesses and the proffer, the stipulation between the parties, is such as is prohibited by the statute."

The standards asserted as proper by the State and accepted by the trial court below are those of both without more. The proper standards, as contained in Maguire, and as must be read into § 17.311(10) are these:

Third exhibits must consist: it must be established that (a) the dominant theme of the material, either as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because its allusions are contemporary, scandalous, repulsive, or revolting to the average person of average intelligence; and (c) the material is utterly without redeeming social value.

Because the exhibits below were condemned under a defective constitutional standard, it necessarily follows that the injunctions issued upon a consideration of the exhibits were defective and invalid as a matter of law.

Normally, we would enter a formal order for new proceedings at this juncture, but the nature of the injunctions entered below calls for further comment. First, the Circuit Court entered its Permanent Injunction relating to the sale of materials as follows:

"COURTED AND ADVISED that the Respondents, Matthew Becker and Bob Hatchem, obscene and profane filer, distributor for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of 28 U.S.C. §17.311 . . . .

The 1st Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. Brandenburg, Inc. v. Sulllivan, 372 U.S. 59 (1963). The operation and effect of the method by which sale of publications is to be restricted must be very carefully defined. Cf. Stanley v. Georgia, 397 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it

does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon his freedom to vend publications. Cf. Smith v. California, 361 U.S. 147 (1959); Erlichman v. State of Michigan, 364 U.S. 51 (1965). See New York Amusement Theatre v. State, 412 S.W.2d 896 (Tenn. 1967).

In Wingfield Books, Inc., supra, a case involving a New York obscenity injunction statute akin to portions of Fla. Stat. § 7.011(7), the injunction proceeding affirmed by the United States Supreme Court was initiated by a complaint charging that a ~~particular~~ named obscene publication was displayed. In Marcus v. Search Warrant, 367 U.S. 717 (1961), at 735, the Supreme Court cited this aspect of Wingfield with approval:

"Second, the restraints in Wingfield Books, both temporary and permanent, ran only against the named publications; no general restraint against the distribution of all 'obscene' material was imposed on the defendants, there, comparable to the warrants here [which were nullified by reversal] which authorized a mass seizure and the removal of a broad range of items from circulation."

In addition to the injunction set out above being invalid in the instant case, we also find that the presentation of Exhibits 1, 2 and 3 below as 'representative' of the contents of the Store was deficient; see Marcus v. Search Warrant, supra, note 28 at 735. Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence.

The Circuit Court also entered a Permanent Injunction relating to the operation of the Store:

207-120 AND 207-120-A suit the operation of the Adult Book and Novel store at 111 Lincoln Street in the city of St. Petersburg, Florida, by the plaintiffs constitutes the conduct being of a public nuisance and Matthew Rock and Carl McCallum "plaintiffs" enjoined from the further operation of or maintenance of said business premises to a "so annoy the community and to become manifestly injurious to the morals or manners of the people."

This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See Meyer v. Mississippi, 460 F.2d 121, 125, 203 U.S. 697 (1971). We reserve judgment, however, on the issue of whether a nuisance theory, in the proper circumstances, might be applicable to obscenity proceedings.

In reaching our conclusion that the proceedings below were constitutionally defective, and that the injunctions issued must be dissolved, this Court intimates no judgment as to the status of the materials involved herein. The injunctions are dissolved; the Circuit Court's ruling on the validity of Fla. Stat. § 7.011 is affirmed; and this cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

ADKINS and McCANN, C.J., and JOHNSON, District Court Judge, concur  
ERVIN, J., concurs in part and dissents in part with opinion  
DURHAM, J., dissents with opinion  
BREW (Retired) J., dissents with opinion

ERVIN, J., concurring in part and dissenting in part:

I agree that the injunctions should be dissolved, and agree that the obscenity test used was unconstitutional, but rather than remanding the case at this time for another trial, I believe this Court should retain jurisdiction until the Supreme Court of the United States considers Moyer v. Austin, 319 F. Supp. 457 (M.D.Fla. 1970).

DEKLE, J. - Dissenting:

We are "fiddling while Rome burns."

Another "Adult Book" Store stays open through the largesse of an appellate court in its expansive maze of legal jargon which seems designed to protect the offenders rather than the offended. The trial judge's order that defendant-operators cease and desist from selling obscene or pornographic publications violative of the statute,<sup>1</sup> is held insufficient for not sufficiently defining those publications, when they are in evidence and consist entirely of stark pictures "in living color." It "does not put the seller on notice as to what is prohibited," we say. These slick photographs of caressing male and female nudes leave no doubt whatsoever. The courts may be in doubt but these purveyors of pornography are not. We are not dealing with the uninformed.

The opinion requires that "one copy of each item sought to be suppressed must be entered into evidence." A clerk's office would become an "Adult Store" itself under this unreasonable standard. No effective control can be attained on such a basis.

The proofs here easily meet the MEMOIRS<sup>2</sup> test recited as elaborating ROTH.<sup>3</sup> The wording of the trial court seems to be seized upon as not phrasing / in the exact wording in MEMOIRS. It is the substance of a trial court's ruling that controls, and not the wording or reasons given.<sup>4</sup>

I therefore dissent.

---

1. Fla. Stat. 5.847.011(10), which our opinion upholds.

2. Memoirs v. Moss, 383 U.S. 413 (1966).

3. Poth v. U.S., 354 U.S. 476 (1957).

4. Pierce v. Scott, 142 Fla. 581, 195 So. 160 (1940); St. Moritz Hotel v. Daughtry, Supreme Ct. Case No. 40,530, Opinion filed June 9, 1971.

DREW (Ret.) J., dissenting:

I would affirm trial court.